Lee Boon Siah & Ors v Public Prosecutor and other appeals

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS J-05–151–06 OF 2012, J-05–152–06 OF 2012 (MEX), J-05–153–06 OF 2012 (MEX), J-05–154–06 OF 2012 (MEX) & J-05–123–05 OF 2012 (SGP)
AZAHAR MOHAMED, TENGKU MAIMUN AND HAMID SULTAN JJCA
9 JANUARY 2014

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellants charged with drug trafficking — Whether there was break in chain of evidence relating to identity of drug exhibits — Whether trial judge erred in rejecting appellants' argument that drug exhibits had been tampered with — Whether drug exhibits were same as drugs seized from factory — Whether trial judge erred in concluding that there was common intention between appellants to traffic impugned drug — Whether trial judge failed to appreciate defence case — Whether safe to uphold convictions

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Acting on information received about a drug trafficking activity in a factory situated in Johor Bahru (the factory), a police party had conducted a raid of the factory. When the police party arrived at the factory they found the front door locked but managed to gain entry into it by prying open the roller shutter front door and crawling through the space created. The police party conducted a search of the factory and found the five accused persons at the back of the factory. The police also found among others, plastic containers filled with crystals, chemical and liquid materials and equipment believed to be used in the manufacturing of methamphetamine. The materials found were analysed by the chemist and later confirmed to be 29,460.17g of methamphetamine, a dangerous drug. All the five accused persons were jointly charged with trafficking with common intention, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') read together with s 34 of the Penal Code. The trial judge found that there was a prima facie case for the offence of trafficking and called upon the five accused persons to enter their defence. The main defence of the appellants was lack of knowledge of the drugs found in the plastic bags. The accused persons denied any knowledge of the items seized from the factory and denied any knowledge of processing methamphetamine in the factory. The trial judge did not accept the appellants' version of events and convicted them of trafficking and sentenced them to death. Hence the present appeals, which were heard together because they involved the same facts. The common ground in these appeals was that there were serious doubts as to the identity of the drug exhibits. The appellants submitted that the trial judge had erred in rejecting the appellants' argument that the drug exhibits had

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been tampered with and found missing from the police lock-up, and that this had resulted in a break in the chain of evidence regarding the drugs seized. It was also the appellants' contention that the prosecution had failed to prove the element of trafficking and that the trial judge had failed to adequately consider and appreciate the defence case.

Held, dismissing the appeals:

(1) On the facts of the present case, the trial judge was correct in rejecting the appellants' argument that the drug exhibits were not same as the drugs seized from the factory and making a finding that there was no break in the chain of evidence. At the trial the chemist had testified that he had conducted his examination and analysis of every item present at the premises before requesting for the same exhibits to be sent to the Chemistry Department in Johor Bahru for further laboratory analysis. The evidence also made it clear that the drug exhibits had been identified by the chemist, the raiding officer and the investigating officer. Although there were signs of tampering of the packaging of a few of the drug exhibits, the chemist report made it clear that the items in the packaging ie the packets and glass and plastic bottles were not tampered with. Further, the chemist, who was the last person to have identified and accounted for all the drug exhibits, was not cross-examined about the issue of the identity of the drug exhibits (see para 22).

(2) After giving his utmost and serious consideration to the issue of common intention between the appellants, the trial judge concluded that all the five accused persons were involved in the manufacturing of the 29,460.17g of methamphetamine. Thus, there was no merit in the appellants' argument that the trial judge had erred in concluding that there was in existence a common intention between all the appellants to traffic the impugned drug. Even though there was no eyewitness account of any of the appellants making, producing, compounding, assembling or refining the impugned drugs the circumstantial evidence adduced led to the conclusion that the appellants had knowledge and were involved in the manufacturing of the impugned drug. The discovery of the apparatus and chemical materials in the factory and the chemist's evidence as to the uses and functions of these apparatus and materials support the finding that the said factory was used as a clandestine drug laboratory. Further, the fact that there were no residential houses or shops around the said factory showed the appellants' intention to conceal their illegal activities in factory. This together with the presence of the appellants on the premises with methamphetamine drug stains on their clothes or person established a nexus between the appellants and the drug exhibits seized from the factory (see paras 24, 30–31 & 35).

(3) A scrutiny of the judgment of the trial judge revealed that he had

judicially considered the defence of all the appellants before coming to the definite finding of fact that their defence was an afterthought or a recent invention raised during the defence stage. Based on the factual matrix of the present case, the trial judge was correct in rejecting the defence. In the circumstances, the defence of the appellants was incapable of raising a reasonable doubt on the prosecution's case and the appellants' appeal based on the grounds that the trial judge had failed to appreciate the defence case was without merit (see paras 44–45).

[Bahasa Malaysia summary

Bertindak berdasarkan maklumat yang diterima mengenai satu aktiviti pengedaran dadah di sebuah kilang yang terletak di Johor Bahru (kilang), pihak polis telah mengadakan serbuan ke atas kilang tersebut. Apabila pihak polis tiba di kilang tersebut, mereka mendapati pintu depan dikunci tetapi mereka dapat memasuki kilang tersebut dengan mengumpil 'roller shutter' pintu depan dan merangkak menerusi ruang yang diwujudkan. Pihak polis menggeledah kilang tersebut dan menemui lima tertuduh di bahagian belakang kilang tersebut. Polis juga menemui, antara lainnya, bekas plastik yang dipenuhi kristal, bahan-bahan kimia dan cecair dan peralatan yang dipercayai digunakan dalam pembuatan methamphetamine. Bahan-bahan yang ditemui dianalisa oleh ahli kimia dan kemudiannya disahkan sebagai 29,460.17g methamphetamine, sejenis dadah berbahaya. Kesemua lima orang tertuduh didakwa mengedar dengan niat bersama, satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') dibaca bersama dengan s 34 Kanun Keseksaan. Hakim perbicaraan mendapati bahawa terdapat kes prima facie untuk kesalahan mengedar dan memanggil kelima-lima orang tertuduh untuk memasukkan pembelaan mereka. Pembelaan utama perayu-perayu ialah tidak mengetahui mengenai dadah yang ditemui di dalam beg-beg plastik tersebut. Tertuduh menafikan sebarang pengetahuan mengenai barang-barang yang dirampas daripada kilang dan menafikan apa-apa pengetahuan pemprosesan methamphetamine di dalam kilang. Hakim perbicaraan tidak menerima versi peristiwa perayu-perayu dan menyabitkan mereka mengedar dan menjatuhi hukuman mati ke atas mereka. Oleh itu, rayuan ini didengar bersama kerana melibatkan fakta-fakta yang sama. Alasan sama di dalam rayuan ini ialah terdapat keraguan serius mengenai identiti ekshibit-ekshibit dadah. Perayu-perayu menghujah bahawa hakim perbicaraan terkhilaf dalam menolak hujah perayu-perayu bahawa ekshibit-ekshibit telah diusik dan didapati hilang daripada lokap polis dan bahawa ini mengakibatkan rantaian keterangan terputus berhubung dadah yang dirampas. Perayu-perayu juga menghujah bahawa pendakwa raya gagal untuk membuktikan elemen

pengedaran dan bahawa hakim perbicaraan gagal untuk mempertimbangkan secukupnya dan menghargai kes pembelaan.

Diputuskan, menolak rayuan-rayuan:

(1) Berdasarkan fakta-fakta kes ini, hakim perbicaraan betul dalam menolak hujahan perayu-perayu bahawa ekshibit-ekshibit dadah adalah tidak sama dengan dadah yang dirampas daripada kilang dan membuat dapatan bahawa rantaian keterangan tidak terputus. Pada perbicaraan, ahli kimia memberi keterangan bahawa dia menjalankan pemeriksaan dan analisa ke atas setiap barang yang ada di premis-premis sebelum memohon ekshibit-ekshibit yang sama dihantar kepada Jabatan Kimia di Johor Bahru untuk analisa makmal selanjutnya. Keterangan tersebut juga adalah jelas bahawa eksibit-eksibit dadah telah dikenalpasti oleh ahli kimia, pegawai serbuan dan pegawai penyiasatan. Walaupun terdapat tanda-tanda beberapa bungkusan ekshibit dadah diusik, laporan kimia menjadikannya jelas bahawa barang-barang di dalam bungkusan iaitu paket-paket dan kaca dan botol plastik tidak diusik. Seterusnya, ahli kimia yang merupakan orang terakhir yang mengenalpasti dan bertanggungjawab untuk kesemua ekshibit dadah, tidak disoal balas mengenai isu identiti ekshibit-ekshibit dadah (lihat perenggan 22).

(2) Selepas memberikan pertimbangan serius dan sepenuhnya kepada isu niat bersama antara perayu-perayu, hakim perbicaraan memutuskan bahawa kesemua kelima orang tertuduh terlibat dalam pemprosesan 29,460.17g methamphetamine. Oleh itu, tiada merit di dalam hujahan perayu bahawa hakim perbicaraan terkhilaf dalam memutuskan bahawa terdapat satu niat bersama di antara kesemua perayu-perayu untuk mengedarkan dadah yang dipersoalkan. Walaupun tiada saksi yang melihat mana-mana perayu membuat, menghasilkan, mencampurkan, mengumpulkan atau menapis dadah yang dipersoalkan, keterangan persekitaran yang dikemukakan membawa kepada kesimpulan bahawa perayu mempunyai pengetahuan dan terlibat dalam membuat dadah yang dipersoalkan itu. Penemuan radas dan bahan-bahan kimia di dalam kilang dan keterangan ahli kimia mengenai kegunaan dan fungsi radas-radas dan bahan-bahan menyokong dapatan bahawa kilang tersebut digunakan sebagai makmal dadah haram. Seterusnya, fakta bahawa tiada rumah kediaman atau kedai-kedai di sekitar kilang tersebut menunjukkan tujuan perayu-perayu untuk menyembunyikan aktiviti-aktiviti haram mereka di dalam kilang tersebut. Ini bersama dengan kehadiran perayu-perayu di premis dengan kesan-kesan dadah methamphetamine di pakaian mereka atau orang yang membuktikan hubungan antara perayu-perayu dan ekshibit-ekshibit dadah yang dirampas daripada kilang (lihat perenggan 24, 30–31 & 35).

(3) Penelitian penghakiman oleh hakim perbicaraan mendedahkan bahawa

beliau telah mempertimbangkan pembelaan kesemua perayu secara kehakiman sebelum membuat dapatan muktamad bahawa pembelaan mereka merupakan satu pemikiran selepas atau satu rekaan baru yang dikemukakan semasa peringkat pembelaan. Berdasarkan fakta matriks kes, hakim perbicaraan benar dalam menolak pembelaan. Di dalam keadaan ini, pembelaan perayu-perayu tidak mampu menimbulkan satu keraguan munasabah ke atas kes pendakwa raya dan rayuan perayu-perayu berdasarkan alasan-alasan bahawa hakim perbicaraan telah gagal untuk menghargai kes pembelaan adalah tanpa merit (lihat perenggan 44–45).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

Cases referred to

(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v PP [1987] 2 MLJ 336, SC (refd)
Ali Tan bin Abdullah v PP [2013] 2 MLJ 676, CA (refd)
Idris v PP [1960] 1 MLJ 296, CA (refd)
Mahbub Shah v King-Emperor AIR 1945 PC 118, PC (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705, HC (refd)
Pendakwa Raya v Mansor Bin Mohd Rashid & Anor [1996] 3 MLJ 560, FC (refd)
PP v Hun Peng Khai & Ors [1984] 2 MLJ 318 (refd)
R v Doheny and Adams [1997] 1 Cr App Rep 369, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 39B(1)(a), 39B(2)
Penal Code s 34

Appeal from: Criminal Trial No MT(3) 45–34 of 2008 (High Court, Johor Bahru)

Rosal Azmin Ahmad (Shamsuddin & Co) for the first appellant.
Kitson Foong (Ahmad Zaidi & Partners) for the second, third, fourth and fifth appellants.
Ho May Ling (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Azahar Mohamed JCA (delivering judgment of the court):

[1] All these five appeals, namely Criminal Appeals Nos J-05–123–05 of 2012, J-05–151–06 of 2012, J-05–152–06 of 2012, J-05–153–06 of 2012 and J-05–154–06 of 2012 arose from Criminal Trial No MT(3) 45–34–2008,

where all the five accused persons namely, Lim Hung Wang ('the first accused'), Lee Boon Siah ('the second accused'), Jose Regino Gonzalez Villarreal ('the third accused'), Simon Gonzalez Villarreal ('the fourth accused') and Luis Alfonso Gonzalez Villarreal ('the fifth accused') were jointly charged and tried together before the Johor Bahru High Court for trafficking in 29,460.17g of methamphetamine with common intention, an offence in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') and punishable with mandatory death penalty under s 39B(2) of the DDA read together with s 34 of the Penal Code ('the Code').

[2] The first accused is a citizen of Singapore. The third, fourth, and fifth accused persons are three siblings from Mexico.

[3] The charge against all the five accused persons read:

> Bahawa kamu 4 Mac 2008, jam lebih kurang 3.15 petang, di IPL Packaging Industries Sdn Bhd, No 55, Jalan Idaman 1/5, Senai Industrial Park, Senai di dalam daerah Johor Bahru, di dalam Negeri Johor Darul Takzim, lanjutan dari niat bersama kamu telah memperedarkan dadah berbahaya, iaitu 29,460.17g Methamphetamine, dengan itu kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah s 39B(2) Akta yang sama dan dibaca bersama s 34 Kanun Keseksaan.

[4] For convenience and ease of reference, we will refer to all the five appellants in this judgment as in the manner they were referred to in the court below.

[5] The offence was said to have been committed at the IPL Packaging Industries Sdn Bhd factory, No 55, Jalan Idaman 1/5, Senai Industrial Park, Senai, in the District of Johor Bahru, Johor at about 3.15pm on 4 March 2008. All the five accused persons were arrested at the factory, which was said to be a drug manufacturing setting and a clandestine drug laboratory.

[6] At the end of the trial, the learned trial judge was satisfied that the prosecution had proved the case against all the five accused persons beyond reasonable doubt. The learned trial judge found all the accused persons guilty and convicted them of the charge. The learned trial judge then imposed the mandatory death sentence against all of them. They then appealed to this court against the decision of the learned trial judge.

[7] The learned trial had thoroughly set out in his judgment the facts of the case and the relevant as well as the significant evidence which he held made out a prima facie case against all the five accused persons.

[8] The pertinent facts are these. Acting on information received, on 4 March 2008, at about 3.15pm, ASP Sivananthan a/l Vadivelo ('PW10') together with ASP Balasubramaniam a/l Rajoo ('PW5') and a team of police officers conducted a raid on a factory at IPL Packaging Industries Sdn Bhd, No 55, Jalan Idaman 1/5, Senai Industrial Park, Senai, Johor Bahru, Johor. The front door of the said factory was a 'roller-shutter'. PW5 shouted 'polis' and 'buka pintu' a few times but nobody opened the front door. PW5 then instructed one D/SM Abdul Halim bin Said to pry open the 'roller-shutter' door with a tool. When there was enough space to crawl through, PW5 together with his team entered the premise of the factory.

[9] In the said factory, PW5 conducted a search at the lower floor of the said factory and found a brown metallic coloured Honda Odyssey car registration plate No SDL 5443L. Next, PW5 and his team proceeded to the back door of the factory. When the back door was opened, PW5 found all the five accused persons. They were in a state of fright and their clothings were in disarray as if they had just completed carrying out some work. All the five accused persons were then handcuffed. After that, they were taken to the front area of the factory.

[10] The said factory was a 1 1/2 storey 'detached factory' building. The building has three rooms and two bath rooms. The first room at the lower floor measured 10ft x 10ft. The door was made of wood and had a knob type lock. A mirror was fixated at the front portion of the room next to the door. The second room at the lower floor also measured 10ft x 10ft. There was a mirror fixated at the left and right portion of the room with red plastic stuck on it. The room was equipped with an air conditioner and a fan. The third room at the lower floor was a resting and sleeping area. On the upper floor, there was a huge hall and one bath room.

[11] PW5 and his team conducted a full and meticulous examination of the entire factory premise beginning from the first room. PW5 found, among others, plastic containers filled with crystals and liquid materials believed to be methamphetamine as well as equipment and chemical materials believed to be used in the manufacturing of methamphetamine. The exhibits found and seized by PW5 are listed in the search lists ie exh P129 (the first accused), exh P130 (the second accused), exh P131 (the third accused), exh P132 (the fourth accused) and exh P133 (the fifth accused).

[12] On the same date, at about 7.30pm, Mr Muhammad Yazid Ibrahim ('PW4'), the chemist and his assistants accompanied by the investigating officer, ASP Sekam Anor ('PW13') conducted an inspection at the said factory premise. PW4 carried out a systematic and painstaking examination for two consecutive days. Every plastic container, plastic tong, drum tong, cylinder gas

tank, metal tin, thermometer, cooking stove and other equipment found in the said factory premise were examined to determine whether there were dangerous drugs stains such as methamphetamine. SP4 found that the items and equipment on both floors of the said factory premise were contaminated with methamphetamine stains.

[13] PW4 then asked PW13 to send crystals and liquid materials that had already been found and examined at the factory by PW4 to the Chemistry Department for laboratory tests. After the chemical examination and analysis, PW4 later confirmed that the exhibits sent by PW13 contained 29,460.17g of methamphetamine. This formed the subject matter of the charge against all the five accused persons.

[14] On 19 March 2008, PW4 received a box marked R sealed PDRM 539 containing seven envelopes from PW13. In the said envelopes, among others, there were shirt, pants, t-shirt and ten plastic tubes each containing cotton bud labelled with the names of the five accused persons. After conducting the analysis, PW4 found methamphetamine stain on the following exhibits: t-shirt of the first accused; blue jeans brand name 'Exhaust' of the second accused; and shirt brand 'Camel' of the third accused. PW4 also confirmed that hand-swab of the right and left hand collected by DSP Safawi bin Mat Salleh ('PW9') from the first, third, and fifth accused persons at the factory contained methamphetamine.

[15] Encik Mohd Izuan bin Othman ('PW12'), a chemist at the Serology/DNA Forensic Department Jabatan Kimia, Petaling Jaya received a few exhibits from PW13 for analysis. PW12 confirmed that all the accused persons' profile were found on the following exhibits:

(a) underwear (P186), underwear (P188) and tooth brush (P200) — the first accused;

(b) underwear (P195) — the second accused;

(c) glove (P202) — the third accused;

(d) cotton swipe (P211) — the fourth accused; and

(e) glove (P194) — the third, fourth, and fifth accused persons.

[16] Mr Looi Hock Lai ('PW6'), confirmed that he is the owner of the factory and that he had rented the factory to the second accused using another person's identification card by the name of Ong Chin Chye. The rent for the premise was RM4,600 monthly and payment of two months deposit was paid. The two accused made the payment by depositing money into PW6's bank account. PW6 further testified that the exhibits seized from the said factory did not belong to him.

[17] On the basis of the evidence that we have discussed beforehand, after the conclusion of the case for the prosecution, the learned trial judge came to the finding that the prosecution had made out a prima facie case against all the five accused persons.

[18] The learned trial judge therefore called upon all the accused persons to enter on their defence in respect of the offence charged. All the five accused persons elected to give evidence on oath. The defence of all the accused persons may be summarised as follows:

The first accused

A Singapore citizen who was selling shirts in China Town in Singapore. He also used to be a subcontractor dealing in water pipes and painting. He was introduced by his friend to one 'Kok Peng' who then offered him a job as a cleaner at the factory in question for a daily salary of RM60. According to 'Kok Peng', someone would fetch the first accused to the factory, who turned out to be the second accused. On the day of arrest, the first accused and the rest of the accused persons including 'Kok Peng' were arrested by the police outside the back door of the factory, after which all of them were handcuffed, brought to the front of the factory and they remained there in squatting position until midnight after which they were brought to the police station. The first accused denied any knowledge of the exhibits in the factory nor had he any knowledge of those offending items. The first accused admitted that he has no permit to work in Malaysia. The first accused also had an identity card ('IC') on him when he was arrested under the name of 'Tan Ah Koon'. He explained that the purpose of using the IC was to facilitate him in the event he was arrested by the police. He also said he did not know that it is an offence to possess someone else's IC.

The second accused

He returned home from Holland in 2007 after working there as a cook. Later, due to his gambling habits, he was indebted to 'Ah Long' and had to run and hide in Johor Bahru. In Johor Bahru, he met one 'Vincent Lim' who offered him to do black-market balloon business at a factory. Later, the second accused, on the instructions of 'Vincent Lim', met PW6 and signed a Tenancy Agreement using the identity of one 'Ong Chin Chye' to rent the factory in question. He further said 'Vincent Lim' had asked him to use the IC because the balloon business is a black market business. The rental payments, which were banked in PW6's account by the second accused, were provided by 'Vincent Lim'. The balloon business was not doing well and because of that, 'Vincent Lim' then subleased the factory to 'Sim Kok Peng'. 'Sim Kok Peng' later invited the second accused to work as a cleaner at the same factory. Later, using a Honda MPV said to belong to 'Sim Kok Peng', the second accused ferried himself and the other accused persons to and from their houses and the

factory to clean the factory, until the day all of them were arrested including 'Sim Kok Peng'. 'Sim Kok Peng' was also the one who opened the factory to allow all of them to enter. The second accused denied any knowledge of the exhibits in the factory nor had he any knowledge of those offending items. He also denied bringing the offending exhibits into the factory nor was he processing methamphetamine there.

The third, fourth, and fifth accused persons

These three accused persons are brothers from Mexico. Their defence are almost identical in nature. With the exception of the third and fourth accused persons, who came to Malaysia twice (the first time in September 2007), all of them came together to Malaysia in February 2008 after being offered to work in Singapore by a Malaysian named 'Richard'. No clear description was given by them on this 'Richard'. After their arrival in Malaysia, they stayed at 'Richard"s house. 'Richard' then brought them to meet 'Ah Peng', who told them there was good opportunity to work in Singapore, but he needed their passports and crane operator certificates in order to obtain work permit in Singapore. They later moved to 'Ah Peng's' house in Sentosa Johor Bahru. While waiting for the work in Singapore, 'Ah Peng' offered them to work as cleaners at the factory in question. One 'Ah Seng' (second accused) would fetch them in a Honda Odyssey MPV at 10.00am and send them to the factory. On the way there, the second accused picked another person, whom they identified in court as the first accused. When they arrived at the factory, 'Ah Peng' was waiting for them there and opened the front door. They worked there for three days and on the fourth day, which is to say on 4 March 2008, all three of them were arrested by the police together with the first and second accused.

[19] A common feature in the defence case is that reference is made to one person named 'Kok Peng' or 'Ah Peng' or 'Sim Kok Peng'. All the accused persons said that 'Sim Kok Peng' was present and was arrested together with them at the factory on 4 March 2008. After the defence closed its case, PW13 was later recalled at the request of the prosecution to explain that 'Sim Kok Peng', the person said by all the accused to be arrested on 4 March 2008 together with them at the factory, is in fact a person by the name of 'Lai Kok Fan', who was arrested on the same day at about 7.00pm in a car No JFW 6800 at Kampung Melayu Majidee. Therefore, 'Sim Kok Peng' @ 'Lai Kok Fan' was never at the factory when all the five accused persons were arrested on 4 March 2008, contrary to the defence story.

[20] Before us, Mr Rosal Azmin bin Ahmad, learned counsel for the first accused and Mr Kitson Foong, learned counsel for the second, third, fourth, and fifth accused persons have raised a number of grounds in support of the appeals. For convenience, we shall deal each of them together in turn under four principal grounds as follows.

BREAK IN THE CHAIN OF EVIDENCE REGARDING THE DRUGS EXHIBIT AND DOUBT AS TO THE IDENTITY OF EXHIBITS

[21] The same arguments were in point of fact canvassed before the learned trial judge in particular, that the exhibits were tampered with and that some exhibits were found missing from the police lock-up. The identity of the impugned drugs in question was a live issue throughout the trial before the learned trial judge. The learned trial judge rejected the arguments and accepted the explanation by the prosecution that there was no break in the chain of evidence regarding the exhibits and that the offending drugs that were actually seized from the factory in question were the very same exhibits that were analysed by PW4 and confirmed to be methamphetamine weighing in total 29,460.17g and they were for the trafficking of the same drugs that all the five accused persons were charged with.

[22] On the facts of the present case, the learned judge was entitled and correct in making such a finding. The chemist, PW4 had identified each and every exhibit during the course of the trial before the learned trial judge. PW4 had also taken photographs of the exhibits at the factory in question at the material time. On 14 September 2009, the court together with PW4 and all parties concerned went to the factory in question. There, PW4 had identified the relevant exhibits. PW4 conducted his examination and analysis at the factory for two consecutive days ie 4 March 2008 and 5 March 2008. Marquis (Colour) Test and GCMS Test were conducted on plastic containers and their contents thereof. The abovementioned tests were conducted on every item present at the premises. He then requested PW13 to send the exhibits that had already been analysed to the Chemistry Department Johor Bahru for further laboratory analysis. A total of 22 exhibits were sent by PW13 to PW4 on 7 March 2008, at about 5.56pm ie two days after the first analysis was conducted. The exhibits that were sent by PW13 to PW4 for further laboratory analysis were returned to PW13 on 7 July 2008 at 3.35pm. All the exhibits in this case had been identified by the chemist (PW4), the raiding officer (PW5) and the investigating officer (PW13). PW13 had also explained in his testimony about the missing exhibits. PW13 only found out about the missing exhibits on 31 July 2008 ie 4 weeks after PW13 received the exhibits back from PW4 on 7 July 2008. On 18 September 2008, PW4 received from PW13 exhibits marked S1–S6. PW4 stated that there were signs of tampering on the exhibits. It must be emphasised that these exhibits were sent by PW13 after it was discovered that a few exhibits were missing on 31 July 2008. In addition, according to the chemist report of PW4 namely P128, although there were signs of tampering of the packaging exhs S1–S6, it is clearly stated in P128 that the items in the packaging ie packets and glass and plastic bottles were not tampered with. Besides that, it is clear that the tampering is with regards to a few exhibits that were re-sent to PW4 on 18 September 2008 after Taman

Pelangi Report 4491/08 [P238] was made and at that time, the analysis of the drugs had already been conducted on those exhibits. PW4 was never cross-examined about the issue of identity of exhibits between the dates 5 March 2008 and 7 March 2008. PW4, being the person who dealt with the exhibits the first time on 4 and 5 March 2008, and having received 22 exhibits on 7 March 2008, had identified and properly accounted for all the exhibits.

FAILURE ON THE PART OF THE PROSECUTION TO PROVE THE ELEMENT OF TRAFFICKING

[23] Learned counsel argued that the learned trial judge misdirected himself in holding that all the five accused persons were involved in the manufacturing of methamphetamine. It was argued that each of the strands of the circumstantial evidence adduced by the prosecution were not strong enough to establish even a prima facie case against all the accused persons. Learned counsel argued that there were too many doubts in the prosecution case. Furthermore, learned counsel argued that the learned trial judge erred in concluding that there was in existence a common intention between all the accused persons involved to traffic the impugned drugs. It was argued that there was no evidence of any pre-planning or pre-arrange plan between all the accused persons at any point of time, to establish a common intention between them.

[24] After giving our utmost and serious consideration, we do not agree and we dismissed the arguments for the following reasons. In his judgment, the learned trial judge had dealt at some length with this issue as can be seen at pp 613–637 of the appeal record. The learned trial judge had directed and addressed his mind to this critical issue. In para 22.10 (p 634 of the appeal record), the learned trial judge concluded that all the five accused persons were involved in the manufacturing of methamphetamine in the said factory. This is what the learned trial judge said in his judgment:

> Melihat kepada keseluruhan fakta dan keadaan yang wujud dalam kes ini, Mahkamah membuat penemuan fakta bahawa kelima-lima Tertuduh mengetahui dan terlibat dalam pembuatan (manufacturing) Methamphetamine kerana mereka berada dalam 'drug manufacturing setting' di premis kilang tersebut untuk suatu waktu yang lama, iaitu selama empat hari, termasuk hari mereka ditangkap pada 4 Mac 2008. Pakaian kesemua tertuduh, berus gigi dan juga makanan iaitu makanan dalam tin dan makanan mee segera dijumpai di dalam satu bilik tengah di tingkat bawah. 8 buah tilam dan bantal juga dijumpai. Ini menunjukkan bahawa mereka berada di kilang tersebut pada waktu siang dan malam.

[25] The provision of the DDA under which all the accused persons have been charged reads as follows:

39B(1) No person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Malaysia — **A**

(a) traffic in a dangerous drug;

(b) offer to traffic in a dangerous drug; or

(c) do or offer to do an act preparatory to or for the purpose of trafficking in dangerous drug. **B**

(2) Any person who contravenes any of the provisions of sub-section (1) shall be guilty of an offence against this Act and shall be punished on conviction with death.

Section 2 of the DDA, with the necessary emphasis, defines trafficking as follows: **C**

Unless the context other/vise requires, trafficking includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drugs. **D**

[26] Section 2 of the DDA also provides that the word 'manufacture', in relation to a dangerous drug, includes: **E**

(a) the making, producing, compounding and assembling of the drug;

(b) the making, producing, compounding and assembling a preparation of the drug; **F**

(c) the refining or transformation of the drug into another dangerous drug; and

(d) any process done in the course of the foregoing activities.

[27] The word 'includes' is a word of extension and not of definition (see: *Public Prosecutor v Hun Peng Khai & Ors* [1984] 2 MLJ 318). In our view, the above characterising of the word 'manufacture' is extremely wide and can include other acts not explicitly categorised in s 2. From the evidence that has been presented, in our judgment, the circumstances prevailing at the factory premises at the time in question show that all the accused persons were present there for the purpose of 'manufacturing' methamphetamines. Based on the discovery of numerous apparatus and chemical materials that can be used to process drugs found in the factory where all the five accused persons were arrested, the factory in question is as a matter of fact a drug manufacturing setting. The discovery of the apparatus and chemical materials support the finding that the said factory was used as a clandestine drug laboratory. **G** **H** **I**

[28] The point which we think has a very strong bearing on this issue is the testimony of PW4. His evidence to the effect that the factory was used as a

clandestine drug laboratory fits in and consistent with the rest of the evidence adduced by the prosecution. PW4 testified that the said factory premise was used as an illegal laboratory to make and process dangerous drugs methamphetamine based on the following reasons:

(a) the discovery of ephedrine chemical waste which is an important precursor in the production of dangerous drugs methamphetamine;

(b) there are gas cylinders containing hydrogen chloride gas;

(c) the discovery of chemical materials and other items that are needed to produce methamphetamine eg sulphuric acid, hydrochloric acid, sodium hydroxide, iodine, toluene, acetone and potassium dihydrogen phosphate;

(d) there are glass round bottom neck apparatus and thermometer with methamphetamine stains, weighing scale, stove and domestic gas;

(e) the discovery of crystal and liquid materials containing methamphetamine;

(f) the discovery of white/brown liquid and sediment waste also containing methamphetamine stains; and

(g) other apparatus also contaminated with methamphetamine stain.

[29] The other important point to note is that the front gate of the factory is a 'roller-shutter' door and was locked. The 'roller-shutter' door had to be prised open with a tool called 'kuku kambing' when the raid was conducted to enable PW5 and his police team to gain entry to the said factory. There are no residential houses or shops around the said factory. This shows that they intended to conceal their illegal activities in the premise of the said factory.

[30] Even more to the point, as correctly found by the learned trial judge, there was a nexus between the five accused persons and the dangerous drugs exhibits seized. The five accused were arrested in the factory premise. The five accused persons were actually arrested in the premise of the factory because there was a wall encircling the perimeter of the said factory. Tellingly, the clothes of the accused also had methamphetamine stains: t-shirt of the first accused; blue jeans pants brand name 'Exhaust' of the second accused; and shirt brand 'Camel' of the third accused. PW4 also confirmed that, apart from the second and fourth accused, 'hand swab' of the right and left hand collected by PW9 from all the five accused persons at the factory contained methamphetamine. PW12 confirmed that the DNA profile of all the accused persons were found on the following items: underwear and tooth brush (the first accused); underwear (the second accused); glove (the third accused); cotton swipe (the fourth accused); and glove (the third, fourth, and fifth accused persons).

[31] It is true, as argued by learned counsel for the all the accused persons, that there was no eye witness who saw any of the accused persons in the act of making, producing, compounding, assembling or refining the impugned drugs. Still in our judgment, even without the evidence, there were a number of pieces of evidence as we have enumerated above that incriminated all the five accused persons in the commission of the offence. All of which leads us to conclude that all the five accused had knowledge and were involved in the manufacturing of methamphetamine because they were in a drug manufacturing setting in the factory premise. The clothes of all the accused persons, toothbrush as well as canned food and instant noodles were found in the middle room at the lower floor. A total of eight mattresses and pillows were also found. These show that they were in the said factory during the day and night. According to PW5, all the accused persons were in a state of fright and their clothing were in disarray, as if they had just completed carrying out some work. All the five accused persons were working in the said factory premise and that they were not there by accident. They were participants in the making and producing methamphetamine in the said factory. All this admissible circumstantial evidence when taken together, irresistibly and unmistakably lead to the conclusion that the five accused persons were actively involved in the manufacturing of methamphetamine in the said factory. As the Court of Appeal said in *Idris v Public Prosecutor* [1960] 1 MLJ 296, circumstantial evidence should be such that when you look at all the surrounding circumstances, you find such a series of undesigned, unexpected coincidences that, as a reasonable person, you find your judgment is compelled to one conclusion.

[32] For the proper determination of this issue, it must be borne in mind that, as stated in s 2 of the DDA, the term 'manufacture' includes numerous and diverse processes or procedures namely making, producing, compounding, assembling, refining or transformation of the offending drugs. For that reason, in our judgment, unlike for example the act of keeping, concealing, storing, transporting and carrying dangerous drugs which constitute 'trafficking' as defined in s 2 of the DDA that involve the requirement of possession, the manufacturing of dangerous drugs as in the present case does not involve possession (see *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705 and *Pendakwa Raya v Mansur bin Mohd Rashid & Anor* [1996] 3 MLJ 560). In other words, possession of the impugned drugs need not be proven in a case involving 'manufacturing' before the trafficking definition in s 2 of the DDA can be invoked.

[33] This leads us to the provisions of s 34 of the PC, which provides:

> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner is if the act were done by him alone.

[34] Section 34 of the Penal Code is used most often by the prosecution in order to impose joint criminal liability on persons who participate in the commission of an offence (see *Criminal Law in Malaysia and Singapore* (2nd Ed) by Stanley Yeo, Neil Morgan, Chan Wing Cheong, p 942). In order to attract s 34 of the PC, it is essential that several accused persons participated not only in design but also in action. In other words, it is not sufficient that several accused persons share a common intention to commit an offence but they should also actually participate in the commission of the offence by doing some act or the other in furtherance of the common intention. Now, common intention is usually inferred from the facts and circumstances of a particular case and from the conduct of the parties (see *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336). In *Mahbub Shah v King-Emperor* AIR 1945 PC 118, the Privy Council said:

> It is clear to Their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been observed, it is difficult, if not impossible, to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.

[35] Coming back then to the present case, careful perusal of the entire evidence warrant the inference of the common intention of all the accused persons to traffic the impugned drugs. In our judgment, the totality of the evidence reasonably suggest to conclude that all the five accused persons were not in the factory by coincidence but were participants in the making, producing, compounding, assembling and refining methamphetamine weighing in total 29,460.17g at the time of their detention.

COMPETENCY OF PW12 TO GIVE EXPERT EVIDENCE

[36] Learned counsel argued that the learned trial judge erred in accepting the evidence of PW12. He argued that the failure on the part of PW12 to obtain or utilise the DNA database of Latin Americans, in particular those of Mexican descent prior to formulating of his statistical analysis, clearly reveals an attempt by the witness to adduce unfair evidence against the third, fourth, and fifth accused persons.

[37] We do not agree with this argument. In his judgment at pp 651–655, the learned trial judge had dealt at some length with this issue. Regarding the bayesian approach, the learned trial judge is correct when he stated the reason why he did not follow the case of *R v Doheny and Adams* [1997] 1 Cr App Rep 369 was because the technique used to determine the DNA profile can be distinguished from the present case. In the words of the learned trial judge:

Kes *Doheny and Adam v R* telah menetapkan panduan mengenai kebolehpercayaan ('reliability') keterangan DNA. Walau bagaimanapun, kita mesti mengambil perhatian bahawa penemuan ringkas dalam kes *Doheny and Adam v R* adalah berdasarkan kepada teknik yang terdapat pada masa tersebut. Terdapat banyak kaedah bagi mengemukakan profil/DNA dan perkembangan pesat teknologi telah membaiki kaedah yang digunakan.

Dalam kes *Doheny and Adam v R*, analisis telah dijalankan dengan merujuk kepada enam (6) lokus sahaja, sedangkan dalam kes semasa, dengan menggunakan teknologi terbaharu, iaitu teknik PCR, ia telah menggunakan 15 lokus STR (Short Tandem Repeats) dan satu lokus amologenin diperbanyakkan melalui proses PCR (Polymerase chain Reaction).

Dalam kes *R v Bates* [2006] EWCA Crim 1359, Mahkamah Rayuan United Kingdom telah memutuskan bahawa walaupun sebahagian sahaja keterangan profil/DNA dikemukakan, namun ia boleh diterima masuk dengan syarat para juri diberi maklum tentang kekangan-kekangan ujian tersebut dan penjelasan diberi bagi membolehkan penilaian dibuat terhadapnya. Mahkamah menyatakan:

> In arriving at the correct conclusion it is important to remember that scientific evidence frequently only provide a partial answer to a case or to an issue in a case. However, the test of admissibility is not whether the answer is complete, but whether science can properly and fairly contribute to matter in question …

[38] Further, although PW12 did not have the data of Mexicans to be used for reference, PW12 explained that the race of a person does not play an important role in the uniqueness of a person's profile. What is important is the number of locus used in the calculation. The higher the number loci used in calculation, the higher the uniqueness of the profile.

FAILURE TO ADEQUATELY CONSIDER AND APPRECIATE THE DEFENCE CASE

[39] Learned counsel argued that the learned trial judge misdirected himself when he failed to adequately appreciate the defence of the all the accused persons which was given under oath. It was argued that this is a serious non-direction which amounts to misdirection by the learned trial judge warranting appellate intervention.

[40] We find that the complaint of learned counsel lacked merit. This is a factually based ground of appeal. In our judgment, this issue was decided by the learned trial judge wholly on the facts and the prevailing circumstances of the present case. A scrutiny of the judgment of the learned trial judge, particularly at pp 657–679 of the appeal record, revealed that the learned trial judge judicially considered the defence advanced by all the five accused persons before coming to a definite finding of fact as follows:

Selepas meneliti dengan mendalam kes pembelaan bersama-sama dengan kes pihak pendakwaan, Mahkamah berpendapat bahawa keterangan kesemua tertuduh bahawa mereka berada di premis kilang tersebut sebagai tukang cuci adalah tidak munasabah. Berdasarkan keterangan ikut keadaan yang terdapat dalam kes ini, tertuduh-tertuduh berada di premis kilang tersebut sebenarnya adalah bertujuan untuk membuat Methamphetamine.

[41] The learned judge had critically appraised the defence of all the accused persons. He gave reasons for rejecting the defence as follows. The factory was an empty factory. The defence that they were cleaning and throwing the rubbish in the factory is not consistent with all the evidence and relevant factors that exists. Their explanation that they were cleaning the equipment and materials as well as throwing the rubbish in the premise is not reasonable because their inner clothing worn by them eg underwear was also stained with methamphetamine. All the accused persons denied having any knowledge about the offending exhibits in the room because the room was locked and that they have no access. This is an afterthought defence or a recent invention as it was only raised during the defence stage. This was not put to the prosecution witnesses especially PW5 that led the raid. PW13, PW4 and PW5 were also never asked about the door being locked.

[42] In our judgment, based on the factual matrix of the present case, the learned trial judge was correct in rejecting the defence and that the defence had failed to raise a reasonable doubt on the prosecution case. In our judgment, in the case of the third, fourth and fifth accused persons, their story is improbable as the character 'Richard' is unaccounted for, and further the fact that they came half-way around the globe to Malaysia, while not being sure of what to do here, is incredible. Also, if truly they had intended to work in Singapore, as promised by 'Richard', why bother to come to Malaysia when they could have gone to Singapore straight away to work? Indeed they took a big gamble to be here to do something which they themselves would not have probably done back in Mexico. They came here for something more lucrative than just working as cleaners, and that is to manufacture methamphetamines.

[43] In the case of the first accused, he was having an IC in the name of 'Tan Ah Koon', for which he admitted was to help him if he is arrested. The same thing was done by the second accused, who used the IC to sign the tenancy agreement. All these, point to a planning by these two to acquire the use of the factory and the equipment therein using fake identities. The use of a luxury MPV such as Honda Odyssey is also quite strange for a group of lowly paid cleaners, especially when the driver of the MPV is the second accused who is also the tenant of the factory and a cleaner at the same time. Another pertinent fact is that PW6, the landlord, had testified that he was dealing with the second

accused regarding the rental of the factory. No suggestion was made to PW6 about subleasing the factory to 'Sim Kok Peng' as stated by the second accused during his testimony.

[44] In our judgment, the defence of all the five accused persons was incapable of raising a reasonable doubt on the prosecution case. It is true that an accused person has no burden to prove his innocence. The cardinal principle in our administration of criminal justice system is that the prosecution must prove the guilt of the accused beyond reasonable doubt. The court's acceptance of the explanation offered by an accused person must be based upon reason and common sense, and cannot be illogical or irrational. The existence of reasonable doubt is dependent upon the totality of the evidence and on an examination of all the evidence in a fair and reasonable manner and not in isolation (see *Ali Tan bin Abdullah v Public Prosecutor* [2013] 2 MLJ 676).

[45] In the present case, the learned trial judge in his judgment had very meticulously considered the defence of all the accused persons. The learned trial judge was satisfied that all the five accused persons had failed to cast any reasonable doubt on the prosecution case. We are in complete agreement with the learned trial judge. We are satisfied that the learned trial judge had not misdirected himself in any way to occasion an error either on the law or the facts to warrant appellate interference. We find the convictions and sentences of all the five accused persons safe. We accordingly dismissed the appeals and affirmed the convictions and sentences.

Appeal dismissed.

Reported by Kohila Nesan